United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be Argued by:
Brian F. Mumford

Docket No. 74-1729

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS COURTNEY COOK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York

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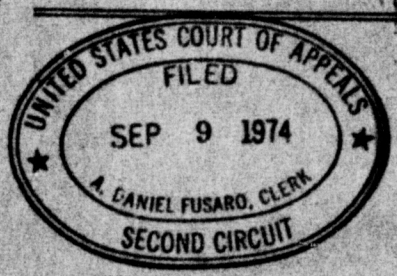
BRIEF FOR APPELLEE



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STATEMENT OF FACTS

Thomas Courtney Cook, who was born April 7, 1948, in Hanover, New Hampshire, registered with the Selective Service System in May 1966. From June 1966 to August 1968, while a divinity student at Our Lady of Hope Seminary, he was classified IV-D. In August 1968 he notified the Local Board that he was no longer attending seminarian school; consequently, he was classified I-A.

On October 3, 1968, Cook filed with the Local Board a Request for Undergraduate Student Deferment (Form 104). Richmond College, Staten Island, New York, certified that Cook entered, and was satisfactorily pursuing, a full-time course of instruction which commenced on September 16, 1968, and he was expected to receive a degree in June 1970. Accordingly, the registrant was classified II-S on October 8, 1968.

On November 2, 1969, Cook filed with the Local Board another Request for Undergraduate Student Deferment (Form 104). Richmond College certified that he had entered upon, and was satisfactorily pursuing, a full-time course of instruction which commenced on September 15, 1969, and he was expected to receive a degree in June 1970. On November 25, 1969, Cook was again classified II-S.

On February 4, 1970, Richmond College certified that Cook was satisfactorily pursuing a full-time course of instruction which had commenced on February 2, 1970, and he was expected to receive a degree in June 1970. By letter dated May 5, 1970, Richmond College notified the Board, "He is still attending Richmond College and registered in the current semester for Spring 1970 a full program of 16 credits."

On July 10, 1970, the Local Board wrote the college to inquire whether Cook had received a degree in June as expected. By letter dated July 13, 1970, the college responded that Cook was still a student at the college; he had completed 76 credits but needed an additional 46 credits to graduate.

On July 15, 1970, registrant filed with the Local Board a completed Current Information Questionnaire (Form 127) in which he stated he was a full-time student at Richmond College and expected to complete the degree requirements in May 1972. On July 15, 1970, Cook also filed with the Board a signed Report of Information (Form 119) in which he stated he had changed his major field of study in January 1970 and lacked sufficient credits in the new field to graduate as scheduled in June 1970. He stated, "I am not in summer school and I expect my graduation date to be 6/72."

The Local Board determined that Cook no longer qualified for a deferment in Class II-S and appropriately classified him I-A. By letter dated July 22, 1970, the Local Board informed the registrant of the new classification.

On August 24, 1970, the Local Board ordered Cook to report for induction on September 22, 1970. Since Cook did not receive this order "during his academic year," he was not granted a I-S(C) deferment. 32 C.F.R. §1622.15(b)* By letter dated September 15, 1970, Cook informed the Local Board that he was a North American Indian and a member of the St. Regis Indians, and, as such, not subject to the Selective Service laws and regulations. On September 22, 1970, Cook failed to report for induction as ordered.

On April 4, 1974, defendant was tried before Chief Judge Foley without a jury. On April 5, 1974, in a Memorandum-Decision and Order defendant was found guilty as charged in a one-count Indictment of violation of Title 50, U.S.C., Appendix, Section 462. Defendant was sentenced on May 20, 1974. He was adjudged a Young Adult Offender under Title 18, U.S.C., Section 4209; imposition of any prison sentence was suspended, and defendant was placed on probation for two years with the special condition that he perform work contributing to the interest of national health, safety and welfare.

POINT I

SINCE DEFENDANT DID NOT RECEIVE INDUCTION ORDER DURING ACADEMIC YEAR HE WAS NOT ENTITLED TO I-S DEFERMENT.

As set forth in the Military Selective Service Act of 1967 (the statutory authority governing the instant case), the customary student deferment is Class II-S. The purpose of this classification is to afford, in the national interest, an opportunity for students to pursue a complete and uninterrupted course of studies leading to a degree. 32 C.F.R. §1622.25;** Nestor v. Hershey, 425 F.2d 504, 513 (1969). The registrant who is classified II-S

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* See Appendix to this brief page 19.

is to be deferred as long as he satisfactorily pursues the course of instruction leading to the degree. The academic year, as it pertains to the II-S registrant, is extended to include twelve months to ensure that a student who is making satisfactory progress is not drafted during the summer vacation when he is not attending classes. Peller v. Selective Serv. Loc. Bd. No. 65, 313 F. Supp. 100, 103 (1970).

Not all students qualify for a II-S classification (e.g. a student who during a given year fails to attain each year a requisite percentage of the total credits needed for his degree does not qualify; see, 32 C.F.R. 1622.25[c]). The Act of 1967 provides Class I-S for the student who is not II-S and who receives an induction notice during his academic year. A I-S deferment permits the student to complete that academic year. 50 U.S.C. App. §456(i)(2); 32 C.F.R. 1622.15.* In distinguishing between the theory behind a II-S classification and a I-S classification, the court in Nestor, supra stated:

> Unlike the II-S, designed to permit education in the national interest, the I-S classification is intended to avoid the hardship and waste of an interrupted academic year. In permitting its student recipient to complete the academic year in which he received an induction order, the I-S classification saves him from the loss of academic credit and tuition which would otherwise result from the interruption of his school year. 425 F.2d at 513.

The I-S deferment is available to a college student who "during his academic year" receives an order to report for induction; the deferment lasts "until the end of his academic year..." 32 C.F.R. §1622.15(b). Since the purpose of this deferment is to avoid the financial and academic hardship of interrupting a semester which is in progress, there is no rational basis for extending the deferment through the summer vacation. If the student is on summer vacation, is not attending classes at any

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* See Appendix to this brief page 19.

institution and is awaiting the commencement of a new semester in September, he is not entitled to a I-S deferment. The Local Board's failure to reopen the registrant's classification is wholly proper. Peller v. Selective Serv. Loc. Bd. No. 65, supra, at 103-104.

Defendant Cook, a student at Richmond College, was classified II-S until July 1970. Since he lacked sufficient credits to graduate as anticipated in June 1970, he no longer qualified for II-S after that date. Defendant notified the Local Board that he would require two additional years to earn his degree; he also stated that he was not attending summer school during the summer of 1970. Defendant was classified I-A in July 1970. 32 C.F.R. §1622.10. On August 24, 1970, defendant was ordered to report for induction in September.

These facts establish that defendant did not receive his order during an academic year. He was awaiting the commencement of the fall term in September and he was not attending summer classes. In Marowitz v. Selective Service Loc. Bd. No. 27, unreported decision, U.S.D.C., N.D.N.Y., 72-CV-467, April 13, 1973, Chief Judge Foley in applying 50 U.S.C. App. §456(i)(2), as amended 1971, stated:

> The reasons [for this statute] are obviously to avoid the hardships of the loss of tuition, negation of that portion of academic work and effort already expended towards that semester's credits, and thus the opportunity to have a clean ending place for the later resumption of his studies.... It is clear and undisputed, and I so find, that plaintiff had not begun the semester or year beginning September 1972 when he received his induction order of August 1972 .... It is obvious that an induction order received in August 1972 is well in advance of a semester not scheduled to commence until September 1972.

The defendant, in his Brief, relies upon Walsh v. Local

Board #10, Mount Vernon, New York, 305 F. Supp. 1274 (S.D.N.Y. 1969) to support the position that he was entitled to a I-S deferment. In that case Judge MacMahon relies on the definition of "academic year" in 32 C.F.R. §1622.25(b) to substantiate his holding that induction orders received during the academic year thus entitling the recipient to a I-S classification. The court in Peller, supra, disagrees with the reasoning in Walsh and finds the definition of "academic year" in Section 1622.25(b) to be expressly limited to II-S classifications. "Its application for I-S purposes cannot be justified under any rational rule of construction." 313 F.Supp. at 103. It is respectfully submitted that the interpretation in Peller is the proper one.

A registrant is not entitled to a I-S(C) classification until after receiving an induction notice. If the facts of his particular situation warrant, he receives a I-S(C) until the end of his academic year. 50 U.S.C. App. §456(i)(2); 32 C.C.R. 1622.15(b). On the other hand, a II-S deferment is granted to a registrant who is satisfactorily pursuing a full-time course of instruction leading to the attainment of a baccalaureate degree. He retains this classification so long as he satisfactorily pursues a full-time course of instruction. As to the II-S deferment, Congress expressly gave the President and the Selective Service System the authority to provide the guidelines governing what constituted a satisfactory pursuit towards a baccalaureate degree by a full time student. 50 U.S.C. App. §456(h)(1). No such authority was granted in the case of a registrant classified I-S(C). 50 U.S.C. App. §456(i)(2).

In establishing the criteria for continued deferment of a II-S registrant, the Selective Service System has established by regulation that such a registrant must obtain 25% of the credits required for the degree during each academic year, and ". . . in class II-S, a student's academic year" shall include the 12 month period following the beginning of his course of study." 32 C.F.R. 1622.25 (a, b, c). From the foregoing it would appear that there

is no basis for assuming that there is a nexus between the academic year provided for in statute as relates to a registrant classified I-S(C) and an academic year provided for in Selective Service Regulations for a registrant classified II-S. In assessing what Congress meant by an "academic year" in Section 456(i)(2), it is submitted, albeit an "academic year" could be a period of 12 months, under certain circumstances, it must be determined by the facts in each case and should not be determined by merely referring to an "academic year" as defined in 32 C.F.R. 1622.25(b). This is borne out best by the comments of Congressman Vinson at page 3239 of the Congressional Record for April 3, 1951 where he stated in regards to the duration of an academic year as pertains to a I-S(C) registrant,

> "In other words, your boy goes to college in September. Suppose the draft board calls him in October. The law steps in and says: 'You cannot lay your hands on him until he has finished that academic year . . . he is merely getting a statutory deferment for twelve months or nine months, and later on he will have to serve just like everyone else . . .' ". [1/] (emphasis added)

Observing the words of Congressman Vinson, it must be concluded that Congress did not intend to fix a specific period as constituting an "academic year" for a registrant classified I-S(C). As stated in Robinson v. Hershey, No. 17697, 7th Cir., July 14, 1969 (unreported):

> ". . . The pertinent statute [50 USC App. §456 (i)] calls for deferment 'until the end of the academic year'. It was obviously not the purpose of Congress to provide a deferment for any fixed

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[1/] The Military Selective Service Act of 1967, as pertains to section 456(i), was adopted as it existed under the Universal Military Training and Service Act of 1951.

length of time, but only so much as necessary to avoid the hardship and waste which would result from interruption of an 'academic year' . . .", (in accord Peller v. Local Board No. 65, 313 F.Supp. 100 (N.D. Ind., 1970), McLain v. Selective Service Local Board No. 47, 439 F.2d 737 (1971); Cf. Ellis v. Hershey, 302 F. Supp. 347 (E.D. Mich. 1969).

POINT II

CONGRESS INTENDED THAT INDIANS BE INCLUDED WITHIN MANDATES OF SELECTIVE SERVICE LAW.

Courts have long agreed that membership in the Six Nations of the Iroquois Indians does not exempt one from the requirement of military service. In the leading case, Ex Parte Green, 123 F.2d 862 (2d Cir., 1941), cert. den. sub. nom. Green v. McLean, 316 U.S. 668 (1942), the Court of Appeals, Second Circuit, held that members of the Six Nations of Indians were subject to the Selective Training Act of 1940. This case has been reaffirmed not only by the Second Circuit but by virtually every court which has faced a similar question under the Act of 1940 or the subsequent Military Selective Service Act of 1967. Williams v. United States, 406 F.2d 704 (9th Cir. 1969) (per curiam), cert. den. 394 U.S. 959 (1969); Petition of Moser, 182 F.2d 734 (2d Cir. 1950); Albany v. United States, 152 F.2d 266 (6th Cir. 1945); United States v. Forness, 125 F.2d 928, 941 n. 38 (2d Cir. 1942); United States v. Craig, 353 F. Supp. 121, 123 (D. Minn. 1973); United States v. Neptune, 337 F.Supp. 1028 (D. Conn. 1972); United States v. Claus, 63 F. Supp. 433 (W.D. N.Y. 1944); Totus v. United States, 39 F. Supp. 7 (E.D. Wash. 1941).

The arguments put forth by defendant Cook are substantially those put forth in Green. Cook asserts that treaties entered into between the Six Nations and the

United States establish the Indians tribes as independent nations or sovereignties which have the right of self-government. This independent status, defendant urges, is inconsistent with the process of conscription of Indians. The Court in Green, assuming arguendo this independent treaty status, held that Congress validly abrogated the treaties by declaring native born Indians to be citizens [2] and subsequently making all male citizens subject to the military draft. [3]

Defendant Cook contends the Court was incorrect in deciding Green since there is insufficient showing that the Congress intended to modify the treaties previously entered into with the Six Nations.

In considering the Nationality Act of 1924 and subsequent acts which grant citizenship to all Indians born within the territorial limits of the United States, the historical background should be considered. Prior to the 1924 Act, Indians could acquire citizenship only through treaties or acts of Congress. Those who did not qualify under either means occupied a peculiar status under Federal law. They were not citizens and could not become citizens under existing naturalization laws. These laws were construed to apply only to foreigners; Indians, who were regarded as domestic subjects or nationals, did not qualify. [4]

The Fourteenth Amendment [5] was held not to confer citizenship upon Indians by reason of birth. The Supreme

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[2] Selective Training and Service Act of 1940, 50 U.S.C.A. Appendix, Section 301 et seq.

[3] Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C.A. Section 3; Nationality Act of 1940, 54 Stat. 1137, 1138, 8 U.S.C.A. Section 501 et seq.

[4] 7 Op. A.G. 746, 749-50 (1856).

[5] U.S. Const. amend, XIV, Section 1 provides: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Court excepted from its doctrine of citizenship by birth those "children of Indian tribes owing direct allegiance to their several tribes." United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898); Elk v. Wilkins, 112 U.S. 94 (1884).

By 1924 approximately two-thirds of the Indians of the United States had already acquired citizenship either by means of statute or treaty. 6/ In June 1924 all Indians born within the territorial limits of the United States acquired citizenship by virtue of the Citizenship Act of 1924, 7/ which provided:

> That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The substance of this section was incorporated in the Nationality Act of October 14, 1940, and is now reenacted in the act of June 27, 1952. 8/ These acts clearly manifest the intent of Congress that Indians born within this country are citizens.

6/ Federal Indian Law; U.S. Dep't of the Interior; U.S. Government Printing Office; 1958; p. 517.

7/ 43 Stat 253

8/ 8 U.S.C. 1401, which states:

(a) The following shall be nationals and citizens of the United States at birth:

(2) a person born in the United States to a member of an Indian, Eskimo, Aleution, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

Prior to 1871, the United States dealt with the Indian tribes by treaty. The President had the authority to negotiate and make agreements which, if ratified by the Senate, were binding. After that date, pursuant to the Appropriation Act of March 3, 1871, [9] further dealings with Indians by treaty were forbidden. Subsequent dealings with the Indians were ratified by both houses of Congress and are, therefore, acts of Congress. When Congress passed the Citizenship Act of 1924 there were almost 400 treaties in existence. [10] These treaties were subject to repeal, modification or adjustment by acts of Congress. Head Money Cases, 112 U.S. 580 (1884); Choate v. Trapp, 224 U.S. 665, 671 (1912). To the extent that these treaties conflict with the legislative grant by Congress of citizenship to Indians, the treaties must be deemed to have been modified by Congress. Congress obviously was aware of the numerous treaties and it was not necessary that express reference be made to them in order to effectuate the legislative modification.

The substance of the act of 1924 was incorporated in the Nationality Act of October 14, 1940, which declared citizenship to any person born in the United States to a member of an Indian tribe. This same year in which Congress provided for citizenship of Indians it passed the Selective Training and Service Act of 1940, 50 U.S.C.A. Appendix, Section 201 et seq., which included "every male citizen" within its terms, 50 U.S.C.A. Appendix, Section 303 (a). Absent an express exclusion of Indians, it should be assumed that Congress intended the inclusion of all male citizens in the draft including Indians, who had been declared citizens.

Again in 1952 Congress enacted legislation conferring citizenship upon the Indians. [11] Notwithstanding the

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[9] 16 Stat. 544, 566; 25 U.S.C.A. Section 71.

[10] The Indian and The Law, Theodore H. Haas, Chief Counsel, United States Indian Service; 1949, p. V.

[11] See note 8 supra.

decision in Green or the many cases with similar holdings, Congress saw fit to leave the statute unchanged. No exclusion of Indians from the draft was provided. Where case law has been consistently followed and is left unchanged by Congress, courts should give consideration to the whole body of law, both statutory and decisional. Reed v. Steamship Yaka, 373 U.S. 410 (1963). This same principle should be applied in construing the Selective Service Act of 1967 as it applies to Indians. Notwithstanding the Green decision in 1941 and the later cases in line with it, Congress made no provision to exclude Indians from military induction when it promulgated the new selective service laws in 1967.

It is submitted that this Court was correct in holding that Congress intended not to except Indians from the requirements of military service.

Defendant Cook suggests in his brief that the language of the various treaties entered into between the Six Nations and the United States manifest an intent to create among the Indian tribes self-governing sovereignties or "nationhoods" which are free from regulation or interference of internal affairs. To support this contention Chief Justice Marshall is extensively quoted from Worcester v. Georgia, 6 Pet. 515 (1832).

In Worcester the State of Georgia had imprisoned a white man for living among the Cherokees contrary to the laws of Georgia. The Supreme Court, in holding that the imprisonment was in violation of the Constitution, stated that the State had no right to infringe upon the Federal power to regulate intercourse with the Indians. The Indian tribes were, in effect, subjects of Federal law, to the exclusion of State law, and entitled to exercise their own rights of sovereignty so far as might be consistent with such Federal law. Although the Chief Justice discussed the doctrine of self-government of the Indians, he in no way suggested that the Indian nations are free from regulation or interference by the Federal Government.

To the contrary, Chief Justice Marshall in defending Federal power over Indians, stated:

> That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded 6 Pet. at 559.

Chief Justice Fuller in the case of Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899), said that Congress possesses "planary power of legislation" in regard to Indian tribes, "subject only to the Constitution of the United States." Among the planary powers exercised by Congress over the Indians was the war power.

There are many statutes which illustrate the exercise of the war power in relation to the Indians. The act of July 5, 1862, 12/ authorized the abrogation of treaties with tribes engaged in hostilities; the act of March 2, 1867, 13/ authorized the withholding of annuities from hostile Indians; the act of February 14, 1873, 14/ regulated the sale of arms to hostile Indians; and the act of March 3, 1875, 15/ forbade payments to Indian bands at war. Compelling military service of Indians is but another application of the war power.

12/ 12 Stat. 512, 528, R.S. sec. 2080, 25 U.S.C. 72.

13/ 14 Stat. 492, 515, R.S. sec. 2100, 25 U.S.C. 127.

14/ 17 Stat. 437, 457, 459, R.S. sec. 467, 2136, 25 U.S.C. 266.

15/ 18 Stat. 420, 449, 25 U.S.C. 128.

The fact that Congress exercised these planary powers after citizenship was granted to Indians is not inconsistent with such citizenship and does not exclude Indians from their obligation under the Selective Service laws. Winton v. Amos, 225 U.S. 373, 391-392 (1921); Board of Commissioners of Creek County v. Seber, 318 U.S. 705 (1943).

It has been asserted that the Federal Government is a trustee or guardian of the rights of the Indian and as such owes protection to the Indians. It is argued by defendant that this concept of protection is inconsistent with the conscription of Indians.

The concept of "trusteeship," "guardianship" or "wardship" appears to have been first utilized by Chief Justice Marshall. The Chief Justice did not liken the individual Indian to a ward, but rather stated that the relation to the United States of Indian tribes within its territorial limits resembles that of a ward to his guardian. Cherokee Nation v. Georgia, 5 Pet. 1, 17, 18, 20 (1831). The Chief Justice stated:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. (pp. 17-18)

The idea of wardship was subsequently expanded and applied in many different senses. 16/ However, throughout the applications of this concept it is apparent that the protection owing to the Indians is the protection against encroachment of state or individual power or influence. See, Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375 (1886) (wherein the Court states at page 384: "Because of the local ill feeling, the people of the states where [the Indians] are found are often their deadliest enemies") Nowhere is it suggested that the Indian tribes were not subject to the legislative control of Congress.

The wardship or guardianship referred to by the Court was not absolute. It was for Congress to determine when and in what manner the special relationship attached or when it should cease. Board of Commissioners of Creek County v. Seber, 318 U.S. 705 (1943); United States v. McGowan, 302 U.S. 535 (1938); Brader v. James, 246 U.S. 88 (1918); Tiger v. Western Investment Company, 221 U.S. 286 (1911). Congress in determining when and in what manner to cease the guardianship exercised over particular Indians, considers the interests and advantages available to the Indians from the release of conditions of wardship. Against this is weighed the possible jeopardy to Indians from the release of Federal controls and restrains and from exposure to state and individual influences. Congress has generally followed a policy calculated eventually to make all Indians full-fledged participants in American society. See Williams v. Lee, supra; Tiger v. Western Investment Co., supra.

16/ Felix S. Cohen in his extensive research of Indian treaties and laws found at least ten distinct connotations of the term "wardship" in various contexts. Mr. Cohn's Handbook of Federal Indian Law first printed in 1940 is revised and updated: Federal Indian Law; United States Department of the Interior; United States Government Printing Office; Washington, D.C.; 1958; pp. 557-566.

A fine example of the intent of Congress to cease the guardianship over Indians may be seen in legislation effecting the Indians of New York State, to which defendant Cook belongs. From the time of its pronouncement in 1873 the mandate of Worcester v. State of Georgia, as it applied to state court intervention into Indian nations, was followed. The judicial affairs of the Indians were considered internal and remained exclusively within the tribal jurisdiction subject only to Federal regulation. In 1948 Congress determined that it would be advantageous to the Indians of New York State to have the state courts gain criminal jurisdiction over offenses committed on reservations within the state. 17/ A similar finding was made in 1950 pertaining to civil jurisdiction. 18/ Accordingly, legislation granting broad civil and criminal jurisdiction to New York State Courts was enacted by Congress. 19/ The Federal guardianship of Indian judicial matters was curtailed through an act of Congress. The very guardianship pronounced by Chief Justice Marshall was terminated by the exercise of Congressional power.

17/ 1948 U.S. Code Cong. Service, p. 2284.

18/ 1950 U.S. Code Cong. Service, pp 3731-32; House Report No. 2720 reads in part:

> The Indians of New York have been classified by the Indian Bureau as among the most advanced in the Nation, and the Bureau has stated that they are in no further need of governmental supervision or control. The committee therefore believes that, in view of the fact that the Indians have the right to preserve the customs and laws they want to prevail in civil cases, and that the State of New York has expressed its willingness and desire that its courts assume jurisdiction over the civil actions and proceedings as provided for in this bill, this is fair and equitable legislation for the Indians and the State of New York.

19/ 62 Stat. 1224, 64 Stat. 845, 25 U.S.C.A. Sections 232 and 233.

It is submitted that any exemption which defendant Cook might have been entitled to under any treaty based upon the concept of "guardianship" or "protection" has been similarly curtailed. If it can be argued that the treaties between the Six Nations and the United States originally gave rise to a duty on the part of the Federal Government to protest Cook against the nature of hardship arising from defending our nation, such guardianship has ceased at the direction of Congress. Congressional intent to terminate this type of wardship, if it ever existed, is manifest in the legislation of 1924, 1940 and 1952 granting citizenship to Indians born within the territorial limits of the country and the selective service legislation of 1940 and 1967 which made all male citizens subject to its terms.

In considering the Federal Government as trustee or protector of the rights of the Indians, one should not overlook that the Government is the trustee of rights of all citizens and nationals. To suggest that a greater obligation exists to the Indians is not just. It would not be just to hold that the United States Government owes a greater degree of protection to the Indians against the hardships arising from serving in the defense of our nation than it owes to every other citizen or national.

Considering the broad scope of those males who are liable for induction under the Selective Service Act of 1967 it is difficult to conceive of an interpretation of the Act which would exclude Indians. 50 U.S.C.A. Appendix, Section 454 makes liable for training and service those males who, within certain age limits, are citizens of the United States or aliens admitted for permanent residence. In addition, liability also runs to any alien who has been in the country for more than one year. Thus an alien legally in this country on a student visa who remains illegally after the visa has expired would be liable for military service after one year. It is difficult to reason that such an illegal alien is subject to induction but that defendant Cook, a citizen

of this country, is not. Although exclusions are provided in Section 454, there is no exclusion applicable to defendant Cook.

CONCLUSION

THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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APPENDIX.

REGULATIONS*

32 C.F.R. § 1622.15 Class I-S: Student Deferred by Statute

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph

(1) who has previously been placed in Class I-S thereunder or:

(2) who has been deferred as a student in Class II-S and has received his baccalaureate degree;

A registrant who is placed in Class I-S under the provision of this paragraph shall be retained in Class I-S;

(1) until the end of his academic year or;

(2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form 102) and be identified on that record as Class I-S(C).

32 C.F.R. § 1622.25 Class II-S: Registrant Deferred Because of Activity in Study

(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the

*During the period involved the Military Selective Service Act of 1967 and pertinent regulations were in effect.

reqirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

Records and Briefs for State and Federal Courts

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AFFIDAVIT OF SERVICE

RE: U.S. v. Thomas Courtney Cook

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

Everett J. Rea , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of James M. Sullivan, Jr. - U.S. Attorney
Attorney for Appellee
(he personally served three (3) copies of the printed [~~Record~~] [Brief] [~~Appendix~~] of the above-entitled case addressed to:

STEVEN DELIBERT, ESQ.
N.Y. Civil Liberties Union
1345 Avenue of the Americas
New York, New York 10019

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on September 5, 1974.

Everett J. Rea

Sworn to before me this 5th
day of September, 1974.

Ruth L. Mologhey
Commissioner of Deeds

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